No. 264

UNITED STATES OF AMERICA EX REL. DAVID ALMEIDA

PETITION FOR REHEARING OF APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 264

DR. FREDERICK S. BALDI, SUPERINTENDENT, PHILADELPHIA COUNTY PRISON, AND J. W. CLAUDY, SUCCESSOR TO STANLEY P. ASHE, WARDEN, WESTERN STATE PENITENTIARY, *Petitioners,*

vs.

UNITED STATES OF AMERICA EX REL. DAVID ALMEIDA

PETITION FOR REHEARING ON APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Attorney General of Pennsylvania, on behalf of Frederick S. Baldi, Superintendent, Philadelphia County Prison, and J. W. Claudy, Warden, Western State Penitentiary, prays that the order denying Certiorari entered on March 9, 1953, be vacated and a Writ of Certiorari issue to review the judgment entered by the United States Court of Appeals for the Third Circuit (Opinion, R. 412-439) affirming a judgment by Honorable George A. Welch, District Judge, Eastern District of Pennsylvania (Opinion, R. 389-410) granting a Writ of Habeas Corpus to the Respondent who is concededly guilty of murder in the first degree, for the following reasons:

1. The judgments are based on an erronous interpretation of the law of Pennsylvania.

2. The judgments are based on findings diametrically opposed to evidence vouched for by the Respondent as well as positive, clear and uncontroverted evidence submitted by the Petitioners.

Statement

At the outset, Petitioners are fully aware of the "two court rule" and the reliance which this Court places upon the interpretation of local law and findings of fact by the District Courts and the Courts of Appeals. Counsel for the Petitioners sincerely and conscientiously feel that the judgments of the courts below are so patently erroneous, that it is incumbent upon them to more succinctly, than possibly they did in the Petition for Certiorari, once again call these basic and fundamental errors to this Court's attention.

The postulate of the application to the District Court was that the Commonwealth of Pennsylvania, through its prosecuting attorney, suppressed, at the Respondent's trial, evidence from which the jury might have inferred that a police officer shot the victim—an off duty police officer attired in civilian clothing—while attempting to frustrate the escape of the Respondent and his two accomplices from an armed robbery of a large grocery mart. The fundamental predicate of the postulate was a .38 caliber blood stained bullet which was found a few feet from the body of the victim by a police detective shortly after the commission of the crime.

The District Judge held, after hearing, NOTWITHSTANDING positive and uncontroverted evidence to the contrary both through the testimonial assertions of the RESPONDENT'S OWN WITNESS (R. 129-132) for whose credibility he vouched [1] and the Coroner's physician (R. 313-314), for whom the District Judge had the highest regard (R. 321), and whom the District Judge thought could shed "more light on this

than any one I know" (R. 329), that the bullet upon which "the entire case rests" (Opinion, R. 392) DID NOT KILL THE VICTIM.[2]

COMPLETELY IGNORING THE LAW OF THE CASE, as established on the direct appeal and supplementary and collateral proceedings in which the Supreme Court of Pennsylvania, the Court of last resort, by necessity, HAD TO DECIDE THE ISSUE since it was squarely presented to it, AND DID SO DECIDE in conformity with prior decisions of that Court[3], and NOTWITHSTANDING its conclusively demonstrated factual nonrelevancy, the District Judge held THAT BULLET to be material to the jury's determination of the penalty[4] (Opinion, R. 396, 405, 407).

Although the Commonwealth strenuously urged BOTH the FACTUAL and LEGAL nonrelevancy of the bullet on which

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[1] The District Judge appears to have overlooked this MOST IMPORTANT factor. He said (Opinion R. 392) "We will state here that ALL of the evidence produced before us came from the State's own witnesses." (Emphasis supplied)

[2] The bases for the opinion expressed by the ballistics expert, for whose credibility the Respondent vouched, was that the impressions on the bullet indicated that it had FIRST hit the ground and ricocheted (R. 152) and THEN came in contact with FOUR hard surfaces (R. 152); that it could NOT have come in contact with THAT NUMBER of hard surfaces passing through a human SKULL (R. 272); and that it could NOT go through a human SKULL AFTER hitting FIVE hard objects (R. 275).

The bases for the opinion of the Coroner's physician was that there was no bone texture on the bullet "such as would be developed had it struck the head at the point where the bullet entered (R. 314)"; that the bullet which caused death WOULD have mushroomed (R. 325); that the bullet was NOT mushroomed (R. 326); that the ESSENTIAL marking on the bullet indicated "that it struck something hard, FLAT" (R. 326); whereas the human skull is rounded (R. 326) (Emphasis supplied).

[3] *Com.* v. *Williams*, 307 Pa. 334, 160 Atl. 602; *Com.* v. *Hough*, 358 Pa. 247, 56 A. 2d 84 (a companion case).

[4] This conclusion was based on an isolated excerpt from the charge (App'x 1426) of the Court in the trial of the Respondent's accomplice—Smith. A careful reading of the charge very definitely indicates little judicial enthusiasm for the Respondent's contention that neither he nor his accomplices were armed with a .38 caliber weapon. The District Judge, on the basis of pure speculation, however, so concluded.

the District Judge said "the entire case rests" in its brief[5] and at oral argument; nevertheless, the Court of Appeals observed (R. 423) ". . . the Commonwealth has never given any answer as to why the evidence to which we have referred, suppressed as the court below found it to have been, was not pertinent as to the issue of the penalty to be imposed by the jury."[6]

The Court of Appeals, likewise not only rejected the law of the case, as established by the prior litigation, but also the Williams case (Footnote 3, supra) and the Hough case (Footnote 3, supra) and relied on an interim decision[7] which it ADMITTED WAS NOT CONTROLLING, but which it regarded as persuasive authority although that case involved very obviously, an altogether different factual and legal situation.

It is EVIDENT from the Opinion of the Court of Appeals that its failure to accord the LAW OF THE CASE its just due under the Rules of Decision Act, 28 U. S. C. 1652, was due to a multiplicity of factors, viz.:

(1) A MISUNDERSTANDING of the broad powers of the Supreme Court of Pennsylvania to "minister justice"[8];

(2) A MISUNDERSTANDING of the power of the Supreme Court of Pennsylvania to devise new remedies for the ef-

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[5] Petitioners are submitting the only available copies in their files of their brief in the Court of Appeals and refer the Court to pages 29-35, 54-57 and 58-111, thereof.

[6] It is difficult for Petitioners' counsel to perceive just how a more vigorous and authoritative refutation of the Respondent's postulate could have been asserted.

[7] *Com.* v. *Chambers*, 367 Pa. 159, 79 A. 2d 201.

[8] *Com.* v. *Ragone*, 317 Pa. 113, 127, 176 Atl. 454; Cf., *Com.* v. *Jones*, 303 Pa. 551, 154 Atl. 480; *Com.* v. *Loomis*, 267 Pa. 438, 447-448, 110 Atl. 257; *Com.* v. *Senauskas*, 326 Pa. 69, 191 Atl. 167.

fectuation of justice [9], and make existing remedies fit the facts [10];

(3) A MISUNDERSTANDING of the power of the Supreme Court of Pennsylvania to consider—in capital cases at least —evidence dehors the record [11];

(4) A MISUNDERSTANDING of the relationship of the proceedings under the Pennsylvania Act of 1903 [12], which does NOT, as the Court of Appeals very obviously concluded, LIMIT the scope of review on DIRECT APPEAL, but rather it gives a SUPPLEMENTARY remedy;

(5) A MISUNDERSTANDING of the scope of an application for a new trial [13]; and

(6) A MISUNDERSTANDING of the availability of Habeas Corpus. [14]

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[9] *Schoeppe* v. *Com.*, 65 Pa. 51, 57; *Delco Ice Mfg. Co.* v. *Frick Co., Inc.*, 318 Pa. 337, 345, 178 Atl. 135.

[10] "However, we do not predicate anything on the possible inapplicability of the procedure now resorted to by the petitioner. IF HIS CASE WERE MERITORIOUS, WE WOULD READILY FIT THE PROPER REMEDY TO THE FACTS". *Com.* v. *Kurus*, 371 Pa. 633, 635, 92 A. 2d 196 (November 18, 1952). See also *Com.* v. *Harris*, 351 Pa. 325, 41 A. 2d 688.

[11] *Com.* v. *Daily*, 280 Pa. 59, 124 Atl. 440; *Com.* v. *Carter*, 272 Pa. 551, 554-555, 116 Atl. 409; *Com.* v. *Kostan*, 349 Pa. 560, 566-567, 37 A. 2d 606; *Com.* v. *Neill*, 362 Pa. 507, 514, 520, 67 A. 2d 276. In the latter case—a capital case—which was argued on the SAME day as the Respondent's direct appeal and decided three months before it, the majority of the Court, as well as Chief Justice Maxey, who wrote the opinion for the Court in the Respondent's case, and Mr. Justice Jones, who dissented, noted evidence dehors the record. This was specifically called to the attention of the Court of Appeals (Petitioners's brief, pp. 35-39), but the latter Court stated (Opinion, R. 418) that it couldn't presume "that the Supreme Court of Pennsylvania through its Chief Justice who would so obliquely dispose of the issue of deliberately suppressed evidence VITAL to the defense." (Emphasis supplied)

[12] The Act of April 22, 1903, P.L. 245, 19 Purdon's Pennsylvania Statutes Annotated, Section 861.

[13] See cases cited Footnote 11, supra; also, *Com. ex rel.* v. *Ashe*, 28 Pa. D. & C. Reps. 573.

[14] The Court of Appeals concluded (Opinion, R. 432) that the Supreme Court of Pennsylvania refused the application for a Writ of Habeas Cor-

The ERROR of the conclusion of the Court of Appeals relative to the LAW of Pennsylvania is DEMONSTRATED by a recent decision [15] of the Supreme Court of Pennsylvania rendered subsequent to the decision of the court below, in which, the dissenting opinion, clearly evidences that the majority passed upon and decided the BASIC ISSUE OF THIS CASE CONTRA to the Court of Appeals.

The practical RESULT of the decision in this case is APPALLING. If the Respondent is retried on the murder indictment, as he undoubtedly will be, if the decision of the court below is NOT REVERSED, the prosecuting attorney will, undoubtedly, feel obliged to place in evidence a bullet which has no FACTUAL OR LEGAL significance under the law of Pennsylvania. Once such evidence is in the record, the prosecuting attorney would be compelled to refute its relevancy by introducing the same evidence as was vouched for by the Respondent in the District Court,—an obviously anomalous, if not ridiculous, situation.

Conclusion

It is submitted that the judgment of the court below is predicated on serious errors of interpretation of State law as well as facts, and that justice, due process to which the

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pus in the exercise of its discretion not to assume original jurisdiction and based that conclusion on *Com. ex rel. Paylor* v. *Claudy*, 366 Pa. 282, 286-287, 77 A. 2d 350 (January 5, 1951) decided six months AFTER the rejection of the Respondent's collateral application. It not only overlooks the difference in the orders, but also the fact that it appears that on or about May 26, 1950, the Supreme Court of Pennsylvania WAS exercising original jurisdiction. See *Com. ex rel. Lorenzo* v. *Claudy*, 172 Pa. Superior Ct. 240, 241, 93 A. 2d 911; *Com. ex rel. McMorris* v. *Claudy*, 172 Pa. Superior Ct. 283, 285, 94 A. 2d 108. It also overlooks the fact that the Supreme Court of Pennsylvania has, on several subsequent occasions, exercised its original jurisdiction—in capital cases at least. (See cases cited Footnote 18, page 24, Petition for Certiorari).

[15] *Commonwealth ex rel. Carey* v. *Montgomery County Prison Keeper*, 370 Pa. 604, 88 A. 2d 904, c.d. 344 U.S. 845.

State, as well as the individual, is entitled, and the most disturbing legal and factual ramification thereof require:

(1). Reversal; or

(2). Remand to the Court of Appeals for reconsideration in the light of the law of the case, as well as the prior controlling decisions of the Pennsylvania court of last resort which it failed to consider, and subsequent decisions of that court;

Finally, counsel for the Petitioners take vigorous issue with the statements by the Court of Appeals (R. 423) indicating (1) concession by them, of the fundamental predicate of the proceeding[16] and (2) strongly implying (R. 416) that a statement given by Officer McGinley shortly after the affray in which the victim was shot, indicated he (McGinley) was responsible for it.[17]

Respectfully submitted,

ROBERT E. WOODSIDE,
Attorney General of Pennsylvania,
By RANDOLPH C. RYDER,
Deputy Attorney General.

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[16] See Footnotes 5 and 6, supra.

[17] The record in the court below (R. 374, 375, 378, 379, 380, 381) and in the trial of Respondent's accomplice, Smith, (App'x 1194, 1196, 1197, 1205, 1209, 1215, 1219, 1245, 1246) clearly indicates that Officer McGinley was referring to the DRIVER who was on the LEFT side of the get-away vehicle AND who was injured—NOT the victim, who was on the RIGHT side.

Certificate of Counsel

It is hereby certified that the foregoing Petition for Rehearing is presented in good faith and not for delay, and presents substantial questions not previously presented.

RANDOLPH C. RYDER,
Deputy Attorney General of the Commonwealth of Pennsylvania of Counsel for Petitioners.

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